First Supplement to Memorandum 87-37

Subject: Study L-1038 - Abatement; Interest and Income Accruing During Administration

Commencement of Interest on General Pecuniary Devise

Professor Halbach points out a problem with the way proposed Section 12003 interacts with existing Section 16304(a) (Revised Uniform Principal and Income Act). These sections provide:

> 12003. If a general pecuniary devise, including a general pecuniary devise in trust, is not distributed before the first anniversary of the testators' death, the devise bears interest thereafter.
>
> 16304. (a) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an item of property becomes subject to the trust. In the case of an item of property becoming subject to a trust by reason of a person's death, it becomes subject to the trust as of the date of death of the person even though there is an intervening period of administration of the person's estate.

In previous staff materials and reviewers' comments, confusion has resulted from failure to be clear whether we are talking about commencement of *income* to trust beneficiaries, or commencement of *interest* on an unpaid devise to the trust. According to Professor Halbach, these two questions are for practical purposes one and the same: If there is a pecuniary devise in trust, the only possible income is interest on the devise. So although Section 16304 provides that trust income commences at death, it is nullified by Section 12003 which provides that the devise to the trust does not draw interest until one year after death: Since there will be no interest during the first year, there will be no income for the income beneficiary during that year, notwithstanding Section 16304.

One possibility is to revise proposed Section 12003 so that interest on an unpaid general pecuniary devise other than in trust commences one year after death, but interest on an unpaid general pecuniary devise in trust commences at death:

Alternative #1:

> 12003. (a) A general pecuniary devise in trust bears interest from the testator's death.
> (b) Except as provided in subdivision (a), if a general pecuniary devise is not distributed before the first anniversary of the testators' death, the devise bears interest thereafter.

The problem with this solution is that it provides one rule for trusts and another for non-trusts, a solution which most commentators objected to. In the context of when *income* should commence, three commentators (State Bar Study Team 4; Probate, Trust and Estate Planning Section of the Beverly Hills Bar; attorney William Lyshak) thought the rule should be the same (commence at death) whether the devise is to a trust or not. In the context of when *interest* should commence, attorney Richard Kinyon of San Francisco agrees that the rule should be the same (but would delay commencement) whether the devise is to trust or not. (Valerie Merritt expresses a minority view that interest on and income from a general pecuniary devise in trust should commence at death, whether or not that results in a rule different from the non-trust context.)

The majority view that the commencement rule should be the same for trusts and non-trusts suggests that we should revise Section 12003 to provide that interest on all general pecuniary devises commences at death:

Alternative #2:

> 12003. A general pecuniary devise, including a general pecuniary devise in trust, bears interest from the testator's death.

Such a rule has the advantage of being consistent with the rule for specific devises: A specific devise carries with it earnings from the date of death. Proposed Section 12002. However, there are two disadvantages of such a rule:

(1) It will enlarge general pecuniary devises at the expense of residuary devisees when the latter are likely to be the most favored objects of the testator's bounty.

(2) It is inconsistent with the general U. S. rule that a general pecuniary devise does not bear interest until it becomes payable. 6 W. Bowe & D. Parker, Page on the Law of Wills § 59.11, at 412 (rev. ed. 1962).

On balance, the staff is inclined to recommend that interest on a general pecuniary devise should commence at death (Alternative #2 above). What is the Commission's view?

<u>Liability for Expenses of Specifically Devised Property</u>

Section 12002 provides that, where earnings on specifically devised property (usually a residence) are insufficient to pay expenses on the property, expenses are paid out of the estate for one year after death or until the property is distributed to the devisee, whichever occurs first. This proposal was criticized by commentators (see page 4 of basic Memo), who prefer the existing law that expenses of specifically devised property are borne by the specific devisee, whether or not there is income from the property. Estate of Reichel, 28 Cal. App.3d 156, 103 Cal. Rptr. 836 (1972).

Professor Halbach suggests an intermediate position: We could keep the proposed new rule that the commentators criticize, but limit its severity by providing that the (residential) property is deemed distributed to the specific devisee if he or she is placed in possession or occupancy of the premises. This would avoid the objectionable situation where the devisee occupies the property but the estate must pay expenses.

Respectfully submitted,

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